

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

IGNACIO RIVERA)	
Claimant)	
)	
V.)	
)	
CARGILL MEAT SOLUTIONS CORP.)	
Respondent)	Docket No. 1,058,861
)	
AND)	
)	
AIG ASSURANCE COMPANY)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 25, 2015, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on January 7, 2016. Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

This matter was originally before the Board regarding the ALJ's February 9, 2015, Award. In its decision of July 28, 2015, the Board remanded the matter to the ALJ:

At the oral argument of this matter before the Board held June 9, 2015, the parties were first made aware that a joint stipulation of medical records, which included the medical records of Drs. Alexander Neel and Alok Shah, was not received into the evidentiary record before the ALJ. The parties agreed it was their intention for the ALJ to review this evidence prior to making an award of compensation. The parties filed a Stipulation of Medical Records with the Board on June 23, 2015, which included the medical records of Drs. Neel and Shah. That filing has been received and accepted by the Board, and the attached medical records are now a part of the evidentiary record.

For reasons unknown by all involved, the ALJ was not allowed the opportunity to adequately review and evaluate this claim because of the missing evidence. As

such, this matter is remanded to the ALJ for reevaluation of the case with the inclusion of the previously excluded evidence.¹

After reviewing the additional evidence, the ALJ found claimant's accidental injury arising out of and in the course of his employment on November 14, 2011, resulted in a 5 percent permanent partial impairment to the body as a whole.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues he is entitled to a functional impairment of 10 percent to the body as a whole.

Respondent maintains the Award should be affirmed.

The sole issue for the Board's review is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

On November 14, 2011, claimant injured his low back while working for respondent when he slipped on a greasy floor. Claimant felt immediate pain in his upper and lower back. Claimant reported the incident to respondent and received medical treatment in the form of injections, chiropractic treatment and medication.

Dr. Alok Shah first examined claimant on May 11, 2012. As a result of the examination, Dr. Shah ordered a CT scan of the lumbar spine and a nerve conduction study. Dr. Shah imposed restrictions of no lifting over 10 pounds and waist-level work only. Claimant returned to Dr. Shah on June 6, 2012. Claimant complained of low back pain and radicular pain into both lower extremities.

A CT scan taken May 22, 2012, was read to reveal "degenerative arthritic changes in the lumbar spine particularly at L3-L4, L4-L5, and L5-S1 space with some foraminal stenosis at L4-L5 and L5-S1 segment."² Dr. Shah also reviewed a nerve conduction study of claimant's lower extremity, noting a possible bilateral radiculopathy at L5. Dr. Shah determined claimant sustained low back pain and lumbar radiculitis from degenerative disc disease, osteoarthritis, and some central and foraminal stenosis.

¹ *Rivera v. Cargill Meat Solutions Corp.*, No. 1,058,861, 2015 WL 4716620 (Kan. WCAB July 28, 2015).

² Shah Report (June 7, 2012) at 1.

Claimant was treated with physical therapy and anti-inflammatory medications before receiving cortisone injections to his lumbar spine. Claimant reported some improvement, but his pain and discomfort eventually returned. Dr. Shah noted claimant's symptoms were manageable. Claimant complained of bilateral radicular pain each time he saw Dr. Shah. Claimant declined surgical intervention.

Using the *AMA Guides*, Lumbosacral DRE Category II, Dr. Shah assessed an impairment rating of 5 percent impairment to the whole person. Dr. Shah noted claimant reported radicular symptoms, which Dr. Shah described as "unusual."³ He did not provide future treatment recommendations related to claimant's back.

Dr. Pedro A. Murati evaluated claimant on February 6, 2013, at claimant's counsel's request. Claimant complained of low back pain that radiates down both legs and causes difficulty sitting, standing, and sleeping. After reviewing claimant's available history, medical records, and performing a physical examination, Dr. Murati determined claimant has bilateral SI joint dysfunction and low back pain with signs of radiculopathy. Dr. Murati recommended permanent restrictions. He further noted claimant's "current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on . . . 11-14-11 during his employment with [respondent]."⁴ Dr. Murati testified it is more probable than not claimant will require future medical treatment.

Using the *AMA Guides*,⁵ Dr. Murati placed claimant in Lumbosacral DRE Category III for a 10 percent whole person impairment related to his low back pain with signs of radiculopathy. He opined the work-related accident of November 14, 2011, was within all medical certainty and probability the prevailing factor in the development of claimant's condition.

Dr. Vito J. Carabetta examined claimant on March 28, 2014, for purposes of a court-ordered independent medical evaluation. Claimant complained of constant, variable, unimproved aching pain in the midline lumbosacral region, which worsened with lifting and prolonged sitting and standing. Claimant also complained of constant, equal bilateral sciatica continuing down to his feet. After reviewing claimant's available history, medical records, and performing a physical examination, Dr. Carabetta concluded claimant has chronic lumbar sprain and bilateral sciatica. He recommended permanent restrictions.

³ Shah Report (Aug. 23, 2013) at 2.

⁴ Murati Depo., Ex. 2 at 5.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Using the *AMA Guides*, Dr. Carabetta opined:

[Claimant] has subjective sciatica, but there is no objectivity in terms of any possible issues of actual radicular involvement. As we utilize the preferred DRE approach and reference Table 72 on page 110, his presentation is felt to be most appropriately fitting with a Category II situation, and therefore a 5% whole person impairment rating would apply. This would be fully apportioned to the injury date that later occurred with this employer on November 14, 2011.⁶

Claimant testified he continues to suffer constant pain in his back and both legs. Claimant stated he has problems sleeping and must constantly change positions throughout the day. Claimant continues to work for respondent.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-516 states:

(a) In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

⁶ Carabetta IME at 5.

(b) If at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be agreed upon by the parties. Where the parties cannot agree, an independent healthcare provider shall be selected by the administrative law judge. The health care provider agreed to by the parties or selected by the administrative law judge pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

ANALYSIS

Based upon the *AMA Guides*, Dr. Murati placed claimant in Lumbosacral DRE Category III and assessed a 10 percent whole person impairment rating for claimant's low back based upon low back pain with signs of radiculopathy. DRE Category III requires evidence of radiculopathy.⁷ Dr. Murati's use of DRE Category III is consistent with the stipulated medical records. Dr. Shah included a notation of lumbar radiculitis or radicular pain in every clinical and procedure note prepared during the course of his treatment of claimant's low back injury.

On August 23, 2013, Dr. Shah examined claimant for the purpose of providing an impairment rating. Dr. Shah assessed a 5 percent impairment rating for claimant's low back complaints. In his rating report, Dr. Shah referred to claimant's radicular complaints as "unusual."⁸ Dr. Shah does not identify claimant's radicular symptoms as being unusual prior to his impairment rating.

Dr. Carabetta agreed with Dr. Shah and assessed a 5 percent impairment for claimant's low back based upon Lumbosacral Category II of the *AMA Guides*. DRE Category II requires clinical signs of lumbar injury without radiculopathy or loss of motion segment integrity.⁹ Consistent with Dr. Shah's clinical examination, claimant reported bilateral sciatica to Dr. Carabetta. Dr. Carabetta reviewed the nerve conduction studies and determined the examination was neurologically intact. Dr. Carabetta wrote that "it does not appear we are dealing with a lumbar radiculopathy in this case."¹⁰

While Dr. Carabetta's and Dr. Shah's assessments of impairment based upon DRE Category II are reasonable, there is also merit in Dr. Murati's opinion that claimant's

⁷ *AMA Guides*, Table 72, p. 110.

⁸ Shah Report (Aug. 23, 2013) at 2.

⁹ *AMA Guides*, Table 72, p. 110.

¹⁰ Carabetta IME (Mar. 28, 2014) at 4-5.

radicular symptoms place his low back condition in the DRE III Category. More probably than not, claimant's condition is somewhere in between. The Board finds all three opinions to be credible and finds claimant suffers a 7.5 percent impairment to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated August 25, 2015, is modified to reflect a 7.5 percent whole body impairment.

Claimant is entitled to 31.13 weeks of permanent partial disability compensation at the rate of \$393.98 per week or \$12,264.60 for a 7.5 percent whole body impairment, making a total award of \$12,264.60. As of February 20, 2016, all amounts are due and owing, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
kathleen@sraclaw.com

D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
shane@rbr3.com

Hon. Pamela J. Fuller, Administrative Law Judge